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December 26, 2003

VIA PRIVATE EXPRESS MAIL CARRIER:
Mr. Vernon A. Williams
Secretary – Surface Transportation Board
1925 K Street, N.W.
Room 700
Washington, DC 20006

RE: **TOWN OF MILFORD, MASSACHUSETTS**
– Petition For Declaratory Order
STB Finance Docket No. 34444

Dear Secretary Williams:

Please be advised that this firm represents the Grafton & Upton Railroad Company in the above-referenced matter. Enclosed please find for filing, in this matter, one (1) original and ten (10) copies of the following:

(1) *The Grafton & Upton Railroad Company's Reply To The Petition of the Town of Milford, Massachusetts For Declaratory Order;*

(2) *Notice of Appearance*; and

(3) *Certificate of Service.*

An extra copy of the *Reply* and this letter are also enclosed – kindly date/time stamp these extra copies upon receipt and return them to me in the envelope provided. As per the enclosed *Certificate of Service*, copies of the within documents were this day mailed via private express

mail carrier to the Town of Milford's counsel, Gerald Moody, as well as Boston Railway Terminal Corporation.

Thank you for your attention to this matter.

Sincerely,

Michael B. Flynn

MBF/st
cc: Gerald Moody, Esq.
Allen Marsh
Bonnie Cohen
Bridget Lucey
Robert C. Krafty
Richard A. Davidson, Jr., Esq.
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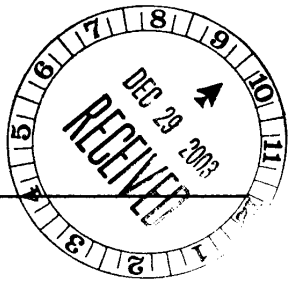
BEFORE THE
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO. 34444

THE GRAFTON & UPTON RAILROAD COMPANY'S REPLY TO THE PETITION OF THE TOWN OF MILFORD, MASSACHUSETTS FOR DECLARATORY ORDER

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Counsel for the respondent, Grafton & Upton Railroad Company

DATED: December 26, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34444

THE GRAFTON & UPTON RAILROAD COMPANY'S
REPLY TO THE PETITION OF
THE TOWN OF MILFORD, MASSACHUSETTS
FOR DECLARATORY ORDER

This *Reply* is filed by and/or on behalf of the Grafton & Upton Railroad Company (the "GU"). The GU requests that the Board either deny the Town's request to institute a Declaratory Order proceeding or issue an Order determining that the railroad operations proposed to be undertaken by the GU at its Milford Yard are exempt from application of the Town's *Zoning By-laws*, the Massachusetts *Wetlands Protection Act* (M.G.L. c. 131 § 40) or any other state or local laws, statutes, regulations and/or ordinances, and further issue an Order determining that any such state or local laws, statutes, regulations and/or ordinances are preempted by the provisions of the *Interstate Commerce Commission Termination Act*, 49 U.S.C. § 10501(b). The GU does not, by submitting this *Reply*, admit that the Town's *Petition* is properly before the Board, and files this *Reply* in order to preserve its rights under the applicable statutory provisions regarding proceedings before the Board and without waiving any rights or arguments (which are hereby expressly reserved) pertaining to the jurisdiction of this matter and the appropriateness of the Town's *Petition*, and does so without waiving or otherwise affecting its right to seek relief in any other appropriate forum (including, but not limited to, requesting a court of competent jurisdiction to stay and/or otherwise terminate this proceeding) and without waiving or otherwise affecting the arguments it raises in any other such forum.

I. STATEMENT OF FACTS:

A. Identity and Addresses of Parties:

The GU is a Massachusetts railroad corporation, whose principal place of business is located at 40 Pullman Street, Worcester, Worcester County, MA. The GU does not dispute the accuracy of the identity and addresses of the other parties identified in the Town's *Petition*.

B. Factual Background:

The GU is a privately owned railroad which was incorporated as the Grafton Center Railroad in 1873 and changed its name to its current moniker in 1887. *See Affidavit of Bridget Lucey* (the GU's General Manager), attached as Exhibit "A." The GU operates over 15.5 miles of main line track that runs from North Grafton to Milford and also has railroad yards in Hopedale, Grafton, Upton and Milford as well as a number of sidetracks throughout its territory. Id. From 1894 to 1928, the GU was a significant passenger carrier. Id. In the early 1900's the GU's freight business increased dramatically. Id. By the 1930's, the GU had become a major regional freight carrier moving primarily cattle and motor vehicles. Id.

From its "heyday" in the 1930's and 40's, the volume of the GU's business has until recently steadily declined. Id. Although it has never completely stopped doing business, the GU has until recently been relatively dormant. Id. A number of its tracks have become underutilized, a number of its grade crossings have been paved over, there are a number of encroachers on its property and the customers it services are few in number. Id. However, the GU has recently begun efforts to reestablish itself as a viable and profitable railroad, and has undertaken measures to improve its infrastructure, re-utilize its yards and increase the volume of freight it moves over its tracks. Id. Unfortunately, the GU is not well-capitalized. Id. The future economic health (and very existence) of the GU depends on generating cash flow through

projects which can be carried out on the portions of its infrastructure which can currently support income-generating railroad operations. Id. The GU intends to reinvest income so generated to improve its lines and develop more business. Id.

The prime location for conducting income-generating railroad operations is the GU's Milford Yard (the "Yard"). Exh. A. The GU currently interchanges railcars with CSX Transportation, Inc. ("CSX") at North Grafton. Id. On the Milford side, the GU's tracks terminate at an intersection with a busy CSX freight line known as the "Milford Secondary Branch." Id. The Milford Yard is located immediately west of the point of intersection between the GU's main line and CSX's Milford Secondary Branch. Id.

The GU's main line runs directly through the Milford Yard – the Yard is physically located on both sides of the main line track. Id. The GU has desired to increase its business by developing the Milford Yard and increasing its ability to interchange with CSX. Id. The Yard is a unique and ideal location since it connects almost directly to CSX's line. Id. In order to enable the interchange of cars with CSX at the Yard, the GU (within the last four months) has had an old switch reinstalled at the point where the GU's tracks connect to CSX's Milford Secondary Branch. Id.

The GU has been attempting to develop new business with the assistance of railroad consultants, including Robert Krafty, the former Manager of Real Estate for the Consolidated Rail Corporation (CSX's predecessor in the northeast). Id. Earlier this year, Mr. Krafty contacted Allen Marsh, the principal of a company called Boston Railway Terminal Corporation ("BRT"), with a proposal to move BRT's operations to the Milford Yard. Id. BRT is a terminal railroad company and its principal business is the distribution of steel. Id. BRT currently operates out of a facility located in South Boston which is owned by CSX. Id. BRT accepts

shipments of steel via railcar at its facility, where the railcars are moved about, the steel is off-loaded and placed onto trucks and then shipped to BRT's customers throughout the region. Id. BRT owns and operates its own locomotive and conducts its own railroad switching operations at and within its South Boston facility. Id. CSX has advised BRT it must vacate the South Boston facility as soon as possible. Id.

The Milford Yard is uniquely located and configured to accommodate BRT's operations – it is connected almost directly to CSX, it is geographically located in the center of BRT's sphere of operations and it has roadway access via Route 140 to Route 495 (a desired route for the trucks which will haul steel to BRT's customers). Exh. A. The BRT also provides a unique opportunity for the GU. Id. The Yard is obviously a significant GU asset, but the GU currently can use it only for activities such as those conducted by BRT. Id. There are few, if any, operating terminal railroads (or any other businesses) in Massachusetts which are currently looking to relocate their operations and which would be able to assist in the improvement, development and use of an entire railroad yard. Id. The BRT represents the only current option available for the GU to increase its financial standing through the use of the Yard. Id.

During this past spring, the GU and BRT reached an agreement that the BRT would move its operations to the GU's Milford Yard.[1] Id. As part of this agreement, the GU was required to reinstall the switch connecting its line to CSX's Milford Secondary Branch, a task the GU has already accomplished. Id. BRT will be required to make physical improvements to the

[1] The original agreement called for BRT to lease the Yard from GU. However, the terms of the agreement have consistently evolved and changed over the last few months. Id.

Yard and its tracks. Id. Once this is accomplished, CSX will start delivering shipments of steel via railcars to the GU's account at the Yard, where they will be interchanged to the GU.[2] Id. GU will generate revenue from the interchange of these cars, all of which will have been shipped from other states.[3] Id.

The GU will also be required by its agreement with BRT to perform various operational activities regarding the interchange and movement of the railcars once they have been delivered by CSX. Exh. A. For instance, GU employees will operate a locomotive leased from the BRT and will physically move the railcars from the point of interchange with CSX to locations within the Yard, using both the GU's main line track as well as another track which is also located within the confines of the Yard. Id. BRT employees will then off-load the steel and haul it to customers throughout New England. Id. The GU will then physically move the railcars back to the point of interchange and return them to CSX. Id. The GU will also be required to carry insurance which covers the potential liability exposure presented by these operations. Id. The GU will retain the right to continue to use its main line for other traffic in addition to the BRT's shipments of steel. Id. The proposed GU/BRT agreement is subject to the execution of an acceptable written contract and BRT's being able to commence railroad operations at the Yard.

The GU and BRT began, earlier this year, to negotiate and draft a contract which is intended to memorialize the terms and conditions of the BRT's use of the Yard as well as the

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[2] The GU will be expected to enter into a separate *Interchange Agreement* with CSX in order to begin accepting cars at the Yard. BRT will not be a party to the *Interchange Agreement*. Exh. A.

[3] Steel shippers will pay the GU $250.00 for its services (the shipment of each railcar and the movement of the railcars at and within the Yard). Exh. A. The terms of the proposed GU-BRT agreement also require BRT to pay the GU $5,000.00 per month for the use of the Yard and the services provided by the GU, against which will be offset a $100.00 credit for each railcar brought into the Yard (not to exceed $5,000.00 per month). Id.

charge for the use of the Yard and the charges the GU will be paid for delivering railcars to BRT. Id. The GU and BRT have been ready, willing and able to commence railroad operations, subject to the execution of the written contract, since late spring/early summer [at least as of six (6) months ago]. Exh. A. They have not done so due to the Town's position that the proposed railroad operations cannot legally occur at the Yard. Id. In the early spring, the GU's representatives (including Mr. Krafty and Ms. Lucey) approached the Town to advise it of the GU's proposed use of the Yard. Id. During late spring and early summer, Ms. Lucey and Mr. Krafty met with Town officials, both at the Yard and at Town Hall, to discuss the proposed railroad operations. Id. During those meetings, the GU was repeatedly advised by various Town officials that the Yard was, according to the Town's *Zoning By-Laws*, located in a district classified as "General Residential," the proposed use of the Yard was not allowed in a General Residential district and, therefore, the Town objected to and prohibited the GU and BRT from conducting the proposed railroad operations at the Yard. Id.

After informally attempting to resolve this dispute, the GU retained counsel to present its position to the Town. On September 8, 2003, the GU sent to the Town correspondence advising it that its *Zoning By-Laws* are preempted by federal law, and therefore are inapplicable to the GU, the BRT and the railroad operations planned for the Yard. *See* letter from Attorney Davidson to Town Counsel Gerald Moody, a copy of which is attached to the hereto as Exhibit "B." On October 10, 2003, Town Counsel sent to the GU correspondence in which the Town refuted the substance of the GU's September 8, 2003 letter and asserted that its *Zoning By-laws* were not preempted. *See* letter from Attorney Moody to Attorney Davidson, a copy of which is attached hereto as Exhibit "C." On November 12, 2003, the GU's counsel responded by sending another letter further clarifying its position and refuting the analysis offered by Town Counsel in

his October 10, 2003 correspondence. *See* letter from Attorney Flynn to Attorney Moody, a copy of which is attached hereto as Exhibit "D."

On November 14, 2003, Ms. Lucey, Mr. Krafty and the GU's counsel met with Town Counsel at Milford's Town Hall in an effort to resolve this dispute. Exh. A. At this meeting, Town Counsel indicated that the Town did not agree with the GU's position concerning the preemptive effect of the applicable federal law, but requested additional information concerning the BRT's assets and present operations, and he also requested an opportunity to speak with the Board of Selectmen concerning the issue. Id. The GU's representatives asked the Town to reconsider its position and get back to them as soon as possible. Id. On November 25, 2003, the GU provided the information requested by Town Counsel. *See* letter from Attorney Davidson to Attorney Moody, a copy of which is attached to the Town's *Petition* as Exhibit "C."

Town Counsel never got back to the GU. Exh. A. Instead, GU's counsel telephoned Town Counsel on December 4, 2003 and was then informed, for the first time, that the Town intended to file a petition with the Board concerning the proposed use of the Yard. Id. On December 8, 2003, the Town filed its *Petition*, seeking a declaratory order that the proposed use of the Yard was prohibited by the Town's *Zoning By-laws*, and was also subject to the *Massachusetts Wetlands Protection Act*, M.G.L. ch. 139 § 40. *See* the Town's *Petition* and related correspondence.

The Town has already delayed [for at least six (6) months] and otherwise prevented the GU/BRT's ability to conduct railroad operations at the Yard.[4] The Town's *Petition* represents a

[4] The GU and BRT have been ready, willing and able to commence their use of the Yard since at least July 2003, and would have begun these operations but for the Town's position. Exh. A. Thus, the GU has suffered, and is at this moment continuing to suffer, monetary damages and ongoing lost business opportunities. Six months of payments under the proposed terms of the GU/BRT agreement would have amounted to $30,000.00. *See supra* at n. 3. In addition, at its

further attempt to delay, frustrate and prevent the GU from conducting railroad operations at the Yard. The Town's current position, and its *Petition*, will also likely permanently and irrevocably damage the GU's ability to conduct its business, at the Yard or otherwise, since the BRT will most likely relocate its operations to another location, thereby depriving the GU of this unique business opportunity.[5] The BRT agreement, and the income it is expected to generate, is integral to the GU's economic survival and its ability to finance further development. Exh. A.

II. DISCUSSION OF LAW:

A. The Town's *Zoning By-Laws* and the State *Environmental Protection Act* Are Preempted By Federal Law:

The Supremacy Clause of the United States Constitution provides that the laws of the United States "shall be the supreme Law of the Land...any Thing in the constitution or Laws of any state to the contrary notwithstanding." Art. VI, cl. 2. "Where a state statute conflicts with or frustrates federal law, the former must give way." CSX Transportation v. Easterwood, 507 U.S.

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current location, BRT has averaged the receipt of eleven (11) railcars per month for the last twelve (12) calendar months. *See Petition* at Exh. C. Given this same volume of traffic, BRT would have brought sixty-six (66) railcars into the Yard over the last six (6) months. Applying the credits for these railcars as per the proposed agreement, the total monthly payments would have been reduced to $23,400.00. The GU has also lost, and is continuing to lose, the $250.00 fee it is expected to collect from the shipper of each of these railcars. Given the loss of sixty-six (66) shipments over the last six (6) months, the GU has suffered additional lost revenues in the amount of $16,500.00. Thus, the total lost revenue to date amounts to $41,000.00. So long as the Town continues to obstruct the GU's ability to use its Yard, the GU will continue to lose $7,650.00 per month. Finally, the GU has incurred, and continues to incur, attorneys' fees and other costs associated with this dispute. Exh. A.

[5] The proposed agreement with BRT is extremely unique due to the fact that there are no other terminal railroads in the region that are in need of a rail yard and the services that the GU can provide at the Yard. Exh. A. If the GU does not resolve this dispute as soon as possible, and move the BRT into its Yard, then it will lose the BRT as a tenant and lose the income which results from having the BRT at the Yard. Id. During the late summer and into the fall the BRT advised the GU that, unless the GU could resolve its dispute with the Town, it would need to find another location to relocate its operations. Id. It is the GU's understanding and belief that the BRT has been actively looking for another suitable location for its operations due to the GU's inability to resolve its dispute with the Town. Id.

658, 663 (1993), *citing* U.S. Const., Art. VI, cl. 2; *see also* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992); Maryland v. Louisiana, 457 U.S. 7254, 746, (1981). The Town's *By-Laws*, as well as any other state or local statute or ordinance, conflict with the provisions of the federal *Interstate Commerce Commission Termination Act* ("ICCTA") and are therefore preempted.

1. Expressed Preemption Under The ICCTA:

In 1887, Congress passed the Interstate Commerce Act ("ICA"), which established a statutory scheme for regulating the nation's railroads. The ICA was originally codified at 49 U.S.C. §1, *et seq.* The ICA established the Interstate Commerce Commission ("ICC") as the federal regulatory agency responsible for overseeing railroad transportation. Although the ICA has been changed and amended numerous times since its inception, it continues (in its present form) to govern interstate commerce. In 1995, Congress abolished the ICC by enacting the ICCTA. Pub. L. No. 104-88, Dec. 29, 1995, 109 Stat. 803. The ICCTA established the Surface Transportation Board (the "Board") to take the place of the ICC and granted the Board exclusive jurisdiction over rail functions and proceedings. *See* 49 U.S.C. §701(a). Congress' purpose in passing the ICCTA was to substantially reduce the regulation of railroads and other modes of surface transportation. *See* 49 U.S.C. §10101; *see also* H.R. Rep. No. 104-311, at 82 (1995); Sen. Rep. No. 104-176, at 2 (1995); Pejepscot Industrial Park Ind. Pk. v. Maine Central RR. Co., 215 F.3d 195 (1st Cir. 2003).

When the statute being construed contains an expressed preemption clause, such as §10501(b), "the task in statutory construction must in the first instance focus on the plain wording of the clause...." Easterwood, 507 U.S. at 664. The ICCTA contains a clearly

expressed preemption clause which grants to the Board exclusive jurisdiction over all railroad transportation:

> (b) the jurisdiction of the Board over –
>
> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules...practices, routes, services and facilities of such carriers; and
>
> (2) the construction, acquisition, operation, abandonment or discontinuance of spur, industrial, team, switching, or sidetracks, or facilities, even if the tracks are located, or intended to be located entirely in one state, is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. §10501(b). As one court has observed, "it is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations." CSX Transportation, Inc. v. Georgia Pub. Serve. Comm'n., 944 F. Supp. 1573, 1581 (N.D. Ga. 1996).

Congress and the courts have long recognized a need to regulate railroad operations at the federal level. Congress' authority under the Commerce Clause to regulate the railroads is well-established [*see, e.g.*, Houston, E. & W. Tex. Ry. V. United States, 234 U.S. 342, 350-52 (1914); Pittsburgh v. Lake Erie R.R. v. Railway Labor Executives' Ass'n, 491 U.S. 490, 510 (1989)] and the Supreme Court repeatedly has recognized the preclusive effect of federal legislation in this area. *See, e.g.*, Colorado v. United States, 271 U.S. 153, 165-66 (1926) (ICC abandonment authority is plenary and exclusive); Transit Comm'n v. United States, 289 U.S. 121, 127-128 (1933) (ICC authority over interstates rail construction is exclusive); City of Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77, 88-89 (1958) (local authorities have no power to regulate interstate rail passengers).

The broad nature of Congress' preemption under the ICCTA is further evidenced by the Act's expansive definitions of the terms "railroad" and "transportation." The Act defines "railroad" as including, in pertinent part:

> (B) the road used by a rail carrier and owned by it or operated under an agreement; and
>
> (C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard and ground, used or necessary for transportation.

49 U.S.C. §10102(6). The tracks, yard and equipment that the GU proposes to use for its joint operation with BRT will be used for railroad operations, and therefore clearly meet the statutory definition of "railroad." The ICCTA's definition of "transportation" includes:

> (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and
>
> (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling and interchange of passengers and property.

49 U.S.C. §10102(9) (emphasis added). "It is clear...that Congress intended the preemptive net of the (ICCTA) to be broad by extending exclusive jurisdiction to the Board over anything included within the general and all inclusive term 'transportation by rail carriers.'" Georgia Pub. Serv. Comm'n, 944 F. Supp. at 1582. "By preempting state regulation of railroad operations, and granting exclusive jurisdiction over almost all aspects of railroad operations to the STB, Congress removes the ability of states to frustrate its policy of deregulating and reviving the railroad industry." Id. at 1583. Thus, when §10501(b) grants the Board exclusive jurisdiction over "transportation by rail carriers" it includes the yard, property, tracks, buildings, facilities, freight yards and any equipment used in connection with the railroad or related to the movement

of property (i.e. freight), including the Yard and the rail cars of steel which will be interchanged to the GU and delivered by rail to the BRT at the Yard.

Consequently the ICCTA, by its clearly expressed terms, preempts the application and/or enforcement of the Town's *Zoning By-laws* with the respect to the railroad operations that the GU and BRT plan to conduct at the Yard. The proposed railroad operations fall under the statutory definition of "transportation." It should be noted, in this regard, that the GU is a railroad company and that it will be moving the steel in and around the Yard, that it will be receiving shipments on railcars, that it will be handling and interchanging these shipments at the Yard, and that the buildings and facilities the BRT plans to construct will be used for the movement of freight.

2. ICCTA Preemption of Local Zoning By-laws and Environmental Protection Laws:

A number of recent decisions have determined that §10501(b) preempts local zoning by-laws and any state environmental protection laws, and that the Board's authority to regulate railroad operations is exclusive. In City of Auburn v. United States, 154 F. 3d 1025, 1027-28 (1999), several cities in the state of Washington sought judicial review of Board decisions which found that state and local environmental review laws were preempted by the ICCTA. The Burlington Northern Santa Fe Corporation ("BNSF") sought approval from the Board to reopen for passenger service a rail line route which it had recently reacquired. Id. In order to restore this route, the BNSF was required to repair and improve the line (including the replacement of track sidings and buildings and the construction of communication towers) and sought Board approval to do so (after taking the position during local proceedings that local by-laws were preempted by the ICCTA). Id. The cities then petitioned the Board for an opinion on the

ICCTA's preemptive effect. Id. The Board issued a formal opinion that the local by-laws were preempted and the Court of Appeals for the Ninth Circuit upheld the BOARD determination.

The Ninth Circuit found that Congress' intent to preempt this kind of local regulation of rail lines was explicit in the plain language of the ICCTA and the statutory framework surrounding it: "we find that the plain language of two sections of the ICCTA (§§10501 and 11323-25) explicitly grant the SRB authority over railway projects like (this one)." Id. at 1030. The court noted that "all the cases cited by the parties find a broad reading of Congress' preemption intent, not a narrow one..." and that "[p]re-ICCTA case law addressing federal preemption over railroad operations also supports a broad reading of the statute." Id. Finally, the Ninth Circuit rejected the cities' argument that the ICCTA applies only to "economic" regulation of railroads: "if local authorities have the ability to impose 'environmental' permitting regulations on the railroad, such power will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line." Id. at 1031.

In the case of Friberg , et al. v. Kansas City Southern Ry. Co., 267 F.3d 439 (2001), the Court of Appeals for the Fifth Circuit reversed a jury verdict in favor of the plaintiffs, property owners who claimed that the defendant railroad caused them to go out of business by continuously blocking a grade crossing on a road which led to their business, in violation of Texas' Anti-Blocking Statute. The track in question was a sidetrack which the Kansas City Southern ("KCS") had begun using with more frequency after it was significantly lengthened to accommodate longer trains. In determining that the ICCTA preempted any local ordinances affecting rail operations, the Fifth Circuit stated that "[t]he language of the statute could not be more precise, and it is beyond peradventure that regulation of KCS train operations, as well as

the construction and operation of the KCS side tracks, is under the exclusive jurisdiction of the STB..." Id. at 443. Echoing the sentiment expressed by the Ninth Circuit in City of Auburn, the Friberg court further noted that "[t]he regulation of railroad operations has long been a traditionally federal endeavor, to better establish uniformity in such operations and expediency in commerce, and it appears manifest that Congress intended the ICCTA to further that exclusively federal effort...." Id.

A trial judge in the United States District Court for the District of Minnesota, in the case of Soo Line Railroad Co. v. City of Minneapolis, 38 F. Supp. 1096 (D. Minn. 1998), granted summary judgment in favor of the railroad, where it had sued the City for declaratory judgment and injunctive relief arising from the City's refusal to grant it demolition permits. The railroad had, pursuant to the City's "Code of Ordinances," applied for (and were denied) permits to demolish several buildings in a rail yard. The demolition was a necessary part of the railroad's redevelopment of the yard. One of the City's departments had denied the permit application on the grounds that the buildings which had been scheduled for demolition may have had historic value. Id, at 1097-1098. In granting the railroad's motion, the court determined that the ICCTA preempted the City's authority to regulate the railroad's proposed activities, finding that:

> [t]he language of the Act expresses Congress' clear intent to preempt state and local regulatory authority over the construction, development, and operation of railroad facilities.... (The) demolition of the five buildings and subsequent construction, development, and operation of the proposed bulk transfer facility is subject only to such regulations and requirements as may be imposed by the STB pursuant to the ICCTA.

Id. at 1101.

In Village of Ridgefield Park v. N.Y. Susq. & Western Ry. Corp., 163 N.J. 446 (2000), the plaintiff Village sought to enjoin a nuisance and to regulate the defendant railroad's facility

pursuant to, *inter alia*, the Village's zoning by-laws. The railroad had begun construction of a maintenance facility without first applying for zoning or construction permits. Id. at 450. The Village ultimately sued the railroad, seeking to require it to apply for permits and to shut down the facility. A trial judge granted the railroad's motion for summary judgment and dismissed the Village's lawsuit. The judge's ruling was upheld by New Jersey's Appellate Division and was ultimately affirmed by the New Jersey Supreme Court. In finding that the ICCTA preempted the Village's attempts to regulate the railroad, the New Jersey Supreme Court reasoned that:

> [b]ecause zoning regulations imposed by the Village "clearly could be used to defeat [the Railroad's] maintenance and upgrading activities, thus interfering with the efficiency of railroad operations that are part of interstate commerce,"...the Village may not dictate the location on its right-of-way of the Railroad's maintenance facility.

Id. at 462.

Finally, in Norfolk Southern Ry. Co. v. City of Austell, 1997 U.S. Dist. LEXIS 17236 (Aug. 18, 1997), the federal court in the Northern District of Georgia granted summary judgment on behalf of the plaintiff railroad where it had brought an action for declaratory relief regarding the application, to the construction of an intermodal facility, of the City's zoning by-laws. In so doing, the court determined that the ICCTA preempted the City's by-laws and land use permitting requirements because they prevented the construction and operation of the railroad's facility. Id. "Based upon the clear and unambiguous language of the ICCTA, the court concludes that the instant intermodal facility comes within the ICCTA's definition of 'transportation by rail carriers' over which the STB is given exclusive jurisdiction under... §10501(b)(1)." Id.

The case that the Town, in its *Petition*, relied on most heavily, Florida East Coast Railway Company, 266 F. 3d 1324 (2001), is entirely distinct from the case at hand. In Florida

East Coast, the arrangement between the railroad and its tenant (Rinker) was essentially a land swap. Rinker leased the railroad's premises in order to conduct its own distribution services. The services provided by Rinker had nothing to do with providing "railroad transportation" as that term is defined in the ICCTA. The Eleventh Circuit held that "Rinker's use of the property...and the activities there performed by Rinker serve no public function and provide no valuable services to FEC; rather, the arrangement between FEC and Rinker merely facilitates Rinker's operation of a private distribution facility on FEC-owned premises." Id. at 1336. Here, the GU will be intimately involved in the joint operations which are proposed for the Milford Yard and the operations, in turn, provide valuable services (such as car movements, revenue and the cash needed for further improvements and expansion) to the GU. In sum, the proposed use of the Milford Yard is much more than a "private distribution facility;" therefore, Florida East Coast simply does not apply.

3. The Board's Own Interpretation of Its Authority and ICCTA Preemption:

The Board's own rulings on the preemptive effect of the ICCTA support the GU's position.[6] The Board has, since its inception, taken the position that it has exclusive authority

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[6] Although the Board's rulings can be considered by a reviewing court, they are not dispositive, nor are they necessarily entitled to deference in a court of law. *See* Georgia Pacific Serv. Comm'n, 944 F. Supp. at 1584, n.8. The Board itself has recognized that, in cases such as the GU/BRT situation,

> railroads do not require authority from the Board to build or expand their facilities such as truck transfer facilities, weigh stations, or similar facilities, relating to their railroad operations, or to upgrade an existing line or to construct an unregulated spur or team track. In such cases, we can provide advice about how preemption applies but we have no direct involvement in the process. Thus, the interpretation of the preemption provisions has evolved largely through Court decisions in cases outside of our direct jurisdiction and in which we were not a party.

Borough of Riverdale Petition for Declaratory Order, The New York Susquehanna and Western Railway Corporation, STB Finance Docket No. 33466 at * 7 (Sept. 9, 1999).

over the type of railroad operations that the GU and BRT plan to conduct at the Yard. Shortly after it was created, the Board issued a public notice which stated "that the authority of certain states to regulate intrastate rail matters was terminated by the (ICCTA), effective January 1, 1996." *STB Public Notice*, Ex Parte No. 388, April 3, 1996. In the underlying decision which was ultimately appealed to the Ninth Circuit in City of Auburn, the Board stated that:

> [A] state or local permitting process for prior approval of this project, or of any aspect of it related to interstate transportation by rail,...is preempted.... The Board now has exclusive authority over the construction and operation of rail lines that are part of the interstate rail network....Local law is preempted when the challenged state statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Cities of Auburn and Kent, WA, Petition for Declaratory Order, STB Finance Docket No. 33200, at *4-6 (July 1, 1997).

Two years later, the Board reiterated its position that the ICCTA preempts local zoning by laws:

> [I]t is well-settled that...the Borough can not apply its local zoning ordinances to property used for NYSW's railroad operations... Zoning regulations that the Borough would impose clearly could be used to defeat (the railroad's) maintenance and upgrading activities, thus interfering with the efficiency of railroad operations that are part of interstate commerce... This is the type of interference that Congress sought to avoid in enacting §10501(b).

Riverdale, at *7. The Board further determined that "local entities...can not require that railroads seek building permits prior to constructing or using railroad facilities because of the inherent delay and interference with interstate commerce that such requirements would cause." Id. at *8. The Board made a similar ruling with respect to environmental laws:

> Recent precedent has made it clear that, to the extent that they

> set up legal processes that could frustrate or defeat railroad operations, state or local laws that would impose a local permitting or environmental process as a pre-requisite to the railroad's maintenance, use or upgrading of its facilities are preempted because they would, of necessity, impinge upon the federal regulation of interstate commerce.... actions (of local authority) must not have the effect of foreclosing or restricting the railroad's ability to conduct its operations or otherwise unreasonably burdening interstate commerce.

Id. at *5 - *6.

The Board has, in a case which arises from another Massachusetts dispute, recently echoed these sentiments. In *Joint Petition for a Declaratory Order -Boston and Maine Corporation and Town of Ayer*, STB Finance Docket No. 33971 (April 30, 2001) at *6, the Board noted that "[s]everal courts have held that this statutory preemption applies even in cases – such as the construction of ancillary facilities under (49 U.S.C. §10906)...- where we lack licensing and ancillary authority and therefore do not conduct our own environmental review." *See also* Flynn v. Burlington Northern Santa Fe Corp., 98 F. Supp. 2d 1186 (E.D. Wash. 2000). The facts of *Boston & Maine* are nearly identical to the case at hand – the Town of Ayer sought to prevent, through the enforcement of its zoning by-laws and local environmental regulations, the development of a yard (owned by a railroad) for the purposes of constructing a transloading facility which would off-load motor vehicles from rail cars to be carried by a trucking company to new car dealerships. Id. The Board noted that:

> even local environmental regulation is preempted where Congress intended to preempt all state and local law. As explained in City of Auburn, 154 F. 3d at 1030-31, congressional intent to preempt a state or local permitting process for prior approval of rail activities and facilities related to interstate transportation by rail is explicit in the plain language of §10501(b) and the statutory framework surrounding it.

Id. at *6, n. 24. The Board ultimately ruled that "state and local permitting...(including environmental requirements) are preempted because by their nature they unduly interfere with

interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations. Id. at *6.

The case law, as well as the Board's own decisions, hold that the Town's *Zoning By-laws* and the *Wetlands Protection Act* are preempted, at least to the extent they interfere with the GU and BRT's ability to conduct "railroad transportation" at the Yard. The Town cannot prevent the GU and BRT from moving shipments of steel into and through the Yard; it cannot prohibit the construction activities necessary to improve the Yard in order to accommodate these services; and it cannot require the GU or BRT to submit to any permitting process in this regard. The GU does not dispute that the Town's *By-laws*, to the extent they pertain to matters of "public health and safety," may not be specifically preempted. Nevertheless, the Town cannot use any by-law or ordinance to delay, obstruct or restrict the GU and BRT's attempts to provide the contemplated "railroad transportation" services at the Yard.

4. The Town Has Essentially Admitted That The ICCTA Prohibits It From Taking Any Jurisdiction Over the Proposed Use of the Milford Yard:

The Town has taken the position, in its *Petition*, that its *By-laws* and the *Wetlands Protection Act* are not preempted by the ICCTA because BRT is not a "rail carrier" over which the Board has jurisdiction. *See Petition*, at p. 9-14. In support of this position, the Town cited two recent Board decisions, *Hi Tech Trans, LLC – Petition For Declaratory Order*, STB Finance Docket No. 34192 (Sub-No.1) (Aug. 14, 2003)and *H&M International, Inc. – Petition for Declaratory Order*, STB Finance Docket No. 34277 (Nov. 10, 2003). The Town's reliance on these decisions is misplaced because it has misrepresented (or perhaps misunderstood) the

arrangement contemplated by the GU and BRT.[7] Simply put, the proposed GU/BRT agreement is completely different from the operations which were the subject of *Hi Tech* and *H&M*.

The Board, in both of these cases, refused to extend its jurisdiction to preempt local ordinances over trucking companies which planned to use railroad yards for nothing more than transloading and trucking purposes. See *High Tech* at *2 ("High Tech contracts for trucks to transport...debris from the shippers' construction sites to the truck-to-rail transloading facility located in [the railroad's] Yard, where High Tech unloads the...debris from the trucks and later reloads it onto rail cars."); *H&M* at 2 ("H&M primarily loads and unloads trailers and containers on and off railroad flat cars; moves trailers between parking places and ramp tracks for loading and unloading; lifts, stacks, flips and racks trailers and chassis in connection with the ramping process; ties down, secures and releases equipment loaded onto or unloaded from rail cars; and inspects trailers and cargo for safety and inventory purposes."). In both cases, the Board's decisions were based on a narrow interpretation of the definition of "rail carrier" [*see* 49 U.S.C. §10102(5)] and a finding that the trucking companies were not "rail carriers" subject to the Board's jurisdiction. *See, e.g., H&M* at *2 ("to fall within the Board's jurisdiction, the transportation activities must be performed by a rail carrier, and the mere fact that H&M moves rail cars inside the Marion facility does not make it a rail carrier. To be considered a rail carrier under the statute, there must be a holding out to the public to provide common carrier service.").

[7] This is likely a function of the Town's "jumping the gun" by prematurely filing its *Petition* before it had gained a complete understanding of the facts and before it had given the parties a full opportunity to reach an amicable resolution. The Town filed its *Petition* while GU and its representatives were still trying to work with the Town and also work out the details of the agreement with BRT. At the time the *Petition* was filed the GU's representatives were waiting for the Town to take a less formal position and had expressed a willingness to negotiate this dispute.

The Board also noted that the determination of whether or not a particular operation falls under the jurisdiction of the ICCTA is a fact-specific determination. *H&M* at *2. Both decisions were based on facts which are not present here. First, the GU, unlike the petitioners in the Board's *High Tech* and *H&M* decisions, is a rail carrier. Second, the petitions in *High Tech* and *H&M* pertained simply to the trucking companies' operation of transloading facilities within a railroad's yard, and did not seek the Board's determination as to whether it would have had jurisdiction over the entire yard itself or the railroad operations which were being conducted within the yard.

Third, the most crucial factor in each of these decisions was that the railroads involved had little (if anything) to do with the operation of the transloading facility. *See, e.g., H&M* at *4 ("Nor is there any evidence that [the railroad] has control over H&M's Tech's business operations. To the contrary, H&M has specifically stated that all car movements within its facility are 'at the direction of, or under the supervision of, and for the convenience of H&M'... Moreover, the record indicates that the [railroad's] obligations and common carrier duty begin and end at the delivery track at the H&M facility."); *Hi Tech* at *4 ("Hi Tech's relationship with [the railroad] is that of a shipper with a carrier.... The parties all but eliminate [the railroad's] involvement in the operation of the transloading facility and its responsibility for it. There is no evidence (the railroad) quotes rates or charges compensation for use of High Tech's transloading facility."). Here, to the contrary, the GU is intimately involved in the joint operation between it and BRT. For instance, the GU will be leasing the BRT's locomotive, operating it with GU employees and moving shipments of steel by rail car over its mainline tracks, its yard tracks and at the portion of the Yard designated for transloading operations. The GU's insurance agreements will cover the potential liability of these operations. In addition, the GU will be

receiving significant compensation for the use of its facility. Obviously, the GU's obligations and common carrier duties do not begin and end at the CSX interchange point and instead continue throughout the proposed operation. The Town has, by stating in its *Petition* that "BRT proposes to undertake in Milford the ***same receiving and trucking operations as it currently undertakes in South Boston***" (*see Petition* at p. 10) (emphasis added), simply missed the mark in attempting to draw an analogy between the GU/BRT's joint operation and the operations which were rejected by the Board in *High Tech* and *H&M*.

Finally, the railroads involved in the recent Board decisions are large Class I freight railroads with extensive holdings, large capital reserves and plenty of business opportunities. It was important to the Board that the operations over which it refused to exercise jurisdiction were not "considered an integral part of (the railroad's) common carrier service." Here, in stark contrast, the proposed operations are not only an integral part of the GU's service, but comprise the single most important part of its business operations and crucial components of ensuring the GU's future financial viability.

The Town, in its *Petition*, has inappropriately focused its entire argument on BRT. However, as is clearly described herein, the GU is the truly affected party and the operations proposed for the Milford Yard will be conducted jointly. Moreover, the Town has, by taking this position, essentially admitted that the ICCTA preempts any effort by the Town to prevent the GU/BRT's operations in this case – in its *Petition* (at p. 10) the Town stated that "[b]y the plain language used by Congress, it is the transportation, and related activities, undertaken by ***rail carriers*** that benefit from preemption, not activity which may be related to rail transportation which is provided and undertaken by non-rail carriers like BRT. As was stated in Fletcher Granite Company, LLC..., under the preemption provisions of the ICCTA, '...zoning ordinances

and local land use permit requirements are preempted as to facilities that are an ***integral part of the railroad's interstate operations***.'" (citations omitted). Here, the GU's proposed use of the Milford Yard is "railroad transportation" which will be undertaken by a "rail carrier" and is an "integral part" of the GU's operations. By the Town's own reasoning, then, its *By-laws* and any other local land use requirements are preempted.

III. CONCLUSION:

WHEREFORE, for all the above stated reasons, the Board should deny the Town's request to institute a Declaratory Proceeding, or issue an Order determining that the railroad operations proposed for the Milford Yard are exempt from the application of the Town's *Zoning By-Laws, the Wetlands Protection Act* or any other state or local statute law, statute, ordinance or regulation, and further issue an Order that any such laws, statutes, regulations and/or ordinances are preempted by the *ICCTA* and that the Town is prohibited from enforcing any such laws, statute, ordinances or regulations with respect to the GU's proposed use of the Milford Yard.

Respectfully submitted,
The GRAFTON AND UPTON
RAILROAD COMPANY,
by its attorneys,

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DATED: December 26, 2003

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EXHIBIT "A"

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34444

THE GRAFTON & UPTON RAILROAD COMPANY'S
REPLY TO THE PETITION OF
THE TOWN OF MILFORD, MASSACHUSETTS
FOR DECLARATORY ORDER

AFFIDAVIT OF BRIDGET LUCEY

Now comes Bridget Lucey to set forth the following:

1. My name is Bridget Lucey and I am the General Manager of the Grafton and Upton Railroad Company ("GU").
2. Grafton and Upton Railroad Company ("GU"), is a Massachusetts railroad corporation, whose principal place of business is located at 40 Pullman Street, Worcester, Worcester County, MA.
3. The GU is a privately-owned railroad which was incorporated as the Grafton Center Railroad in 1873 and changed its name to its current moniker in 1887.
4. The GU has a mainline that runs from North Grafton, MA to Milford, MA that has an overall length of approximately 15.5 miles.
5. The GU's main line track runs from North Grafton to Milford and also has railroad yards in Hopedale, Grafton, Upton and Milford as well as a number of sidetracks throughout its territory.
6. From 1894 to 1928, the GU was a significant passenger carrier.
7. In the early 1900's the GU's freight business increased dramatically.

8. By the 1930's, the GU had become a major regional freight carrier moving primarily cattle and motor vehicles.

9. From its "heyday" in the 1930's and 40's, the volume of the GU's business has until recently steadily declined.

10. Although it has never completely stopped doing business, the GU has until recently been relatively dormant.

11. A number of its tracks have become underutilized, a number of its grade crossings have been paved over, there are a number of encroachers on its property and the customers it services are few in number.

12. However, the GU has recently begun efforts to reestablish itself as a viable and profitable railroad, and has undertaken measures to improve its infrastructure, re-utilize its yards and increase the volume of freight it moves over its tracks.

13. Unfortunately, the GU is not well-capitalized.

14. The future economic health (and very existence) of the GU depends on generating cash flow through projects which can be carried out on the portions of its infrastructure which can currently support income-generating railroad operations.

15. The GU intends to reinvest income so generated to improve its lines and develop more business.

16. The prime location for conducting income-generating railroad operations is the GU's Milford Yard (the "Yard").

17. The GU currently interchanges railcars with CSX Transportation, Inc. ("CSX") at North Grafton.

18. On the Milford side, the GU's tracks terminate at an intersection with a busy CSX freight line known as the "Milford Secondary Branch."

19. The Milford Yard is located immediately west of the point of intersection between the GU's main line and CSX's Milford Secondary Branch.

20. The GU's main line runs directly through the Milford Yard – the Yard is physically located on both sides of the main line track.

21. The GU has desired to increase its business by developing the Milford Yard and increasing its ability to interchange with CSX.

22. The Yard is a unique and ideal location since it connects almost directly to CSX's line.

23. In order to enable the interchange of cars with CSX at the Yard, the GU (within the last four months) has had an old switch reinstalled at the point where the GU's tracks connect to CSX's Milford Secondary Branch.

24. The GU has been attempting to develop new business with the assistance of railroad consultants, including Robert Krafty, the former Manager of Real Estate for the Consolidated Rail Corporation (CSX's predecessor in the northeast).

25. Earlier this year, Mr. Krafty contacted Allen Marsh, the principal of a company called Boston Railway Terminal Corporation ("BRT"), with a proposal to move BRT's operations to the Milford Yard.

26. It is my understanding and belief that BRT is a terminal railroad company, its principal business is the distribution of steel, and currently operates out of a facility located in South Boston which is owned by CSX.

27. BRT accepts shipments of steel via railcar at its facility, where railcars are moved about, the steel is off-loaded and placed onto trucks and then shipped to BRT's customers throughout the region.

28. BRT owns and operates its own locomotive and conducts its own railroad switching operations at and within its South Boston facility.

29. It is my understanding and belief, that CSX has advised BRT it must vacate the South Boston facility as soon as possible.

30. The Milford Yard is uniquely located and configured to accommodate BRT's operations – it is connected almost directly to CSX, it is geographically located in the center of BRT's sphere of operations and it has roadway access via Route 140 to Route 495 (a desired route for the trucks which will haul steel to BRT's customers). The BRT also provides a unique opportunity for the GU.

31. The Yard is a significant GU asset, but the GU currently can use it only for activities such as those conducted by BRT.

32. There are few, if any, operating terminal railroads (or any other businesses) in Massachusetts which currently are looking to relocate their operations and which would be able to assist in the improvement, development and use of an entire railroad yard.

33. The BRT represents the only current option available for the GU to increase its financial standing through the use of the Yard. During this past spring, the GU and BRT reached an agreement that the BRT would move its operations to the GU's Milford Yard.

34. The original agreement called for BRT to lease the Yard from GU. However, the terms of the agreement have consistently evolved and changed over the last few months.

35. As part of this agreement, the GU was required to reinstall the switch connecting its line to CSX's Milford Secondary Branch, a task the GU has already accomplished.

36. BRT will be required to make physical improvements to the Yard and its tracks and once this is accomplished, CSX will start delivering shipments of steel via railcars to the GU's account at the Yard, where the shipments will be interchanged to the GU.

37. The GU will be expected to enter into a separate *Interchange Agreement* with CSX in order to begin accepting cars at the Yard. BRT will not be a party to the *Interchange Agreement.*

38. GU will generate revenue from the interchange of these cars, all of which will have been shipped from other states.

39. Steel shippers will pay the GU $250.00 for its services (the shipment of each railcar and the movement of the railcars at and within the Yard). The terms of the proposed GU-BRT agreement also require BRT to pay the GU $5,000.00 per month for the use of the Yard and the services provided by the GU, against which will be offset a $100.00 credit for each railcar brought into the Yard (not to exceed $5,000.00 per month).

40. The GU will also be required by its agreement with BRT to perform various operational activities regarding the interchange and movement of the railcars once they have been delivered by CSX.

41. For instance, GU employees will operate a locomotive leased from the BRT and will physically move the railcars from the point of interchange with CSX to locations within the Yard, using both the GU's main line track as well as another track which is also located within the confines of the Yard.

42. BRT employees will then off-load the steel and haul it to customers throughout New England.

43. The GU will then physically move the railcars back to the point of interchange and return them to CSX.

44. The GU will also be required to carry insurance which will cover the potential liability exposure presented by these operations.

45. The GU will retain the right to continue to use its main line for other traffic in addition to BRT's shipments of steel.

46. The proposed GU-BRT agreement is subject to the execution of an acceptable written contract and BRT's being able to commence railroad operations at the Yard.

47. The GU and BRT began, earlier this year, to negotiate and draft a contract which is intended to memorialize the terms and conditions of the BRT's use of the Yard as well as the charge for the use of the Yard and the charges the GU will be paid for delivering railcars to BRT.

48. The GU and BRT have been ready, willing and able to commence railroad operations, subject to the execution of the written contract, since late spring/early summer [at least as of six (6) months ago].

49. They have not done so due to the Town's position that the proposed railroad operations cannot legally occur at the Yard.

50. In the early spring, the GU's representatives (including Mr. Krafty and myself) approached the Town to advise it of the GU's proposed use of the Yard.

51. During late spring and early summer, Mr. Krafty and I met with Town officials, both at the Yard and at Town Hall, to discuss the proposed railroad operations.

52. During those meetings, we were repeatedly advised by various Town officials that the Yard was, according to the Town's Zoning By-Laws, located in a district classified as "General Residential," the proposed use of the Yard was not allowed in a General Residential district and, therefore, the Town objected to and prohibited the GU and BRT from conducting the proposed railroad operations at the Yard.

53. After informally attempting to resolve this dispute, the GU retained counsel to present its position to the Town.

54. On November 14, 2003, Mr. Krafty, the GU's counsel, and I met with Town Counsel at Milford's Town Hall in an effort to resolve this dispute.

55. At this meeting, Town Counsel indicated that the Town did not agree with the GU's position concerning the preemptive effect of the applicable federal law, but requested additional information concerning the BRT's assets and present operations, and he also requested an opportunity to speak with the Board of Selectmen concerning the issue.

56. The GU's representatives asked the Town to reconsider its position and get back to them as soon as possible.

57. On November 25, 2003, the GU provided, in a letter from Attorney Richard Davidson, the information requested by Town Counsel.

58. Town Counsel never got back to the GU. Instead, GU's counsel telephoned Town Counsel on December 4, 2003 and was then informed, for the first time, that the Town intended to file a petition with the Surface Transportation Board ("STB") concerning the proposed use of the Yard.

59. On December 8, 2003, the Town filed its Petition with the STB, seeking a declaratory order that the proposed use of the Yard was prohibited by the Town's Zoning By-Laws, and was also subject to the Massachusetts Wetlands Protection Act, M.G.L. ch. 139 § 40.

60. The Town has already delayed [for at least six (6) months] and otherwise prevented the GU/BRT's ability to conduct railroad operations at the Yard.

61. The GU and BRT have been ready, willing and able to commence their use of the Yard since at least July 2003, and would have begun these operations but for the Town's position. Thus, the GU has suffered, and is at this moment continuing to suffer monetary damages and ongoing lost business opportunities. Six months of payments under the proposed terms of the GU/BRT agreement would have amounted to $30,000.00. In addition, at its current location, BRT has averaged the receipt of eleven (11) railcars per month for the last twelve (12) calendar months. Given this same volume of traffic, BRT would have brought sixty-six (66) railcars into the Yard over the last six (6) months. Applying the credits for these railcars as per the proposed agreement, the total monthly payments would have been reduced to $23,400.00. The GU has also lost, and is continuing to lose, the $250.00 fee it is expected to collect from the shipper of each of these railcars. Given the loss of sixty-six (66) shipments over the last six (6) months, the GU has suffered additional lost

revenues in the amount of $16,500.00. Thus, the total lost revenue to date amounts to $41,000.00. So long as the Town continues to obstruct the GU's ability to use its Yard, the GU will continue to lose $7,650.00 per month. Finally, the GU has incurred, and continues to incur, attorneys' fees and other costs associated with this dispute.

62. The Town's STB Petition, if allowed to run its course through the STB's proceedings, will further delay, frustrate and prevent the GU from conducting railroad operations at the Yard.

63. The Town's current position, and its' Petition, will also likely permanently and irrevocably damage the GU's ability to conduct its business, at the Yard or otherwise, since the BRT will most likely relocate its operations to another location, thereby depriving the GU of this unique business opportunity.

64. The proposed agreement with BRT is extremely unique due to the fact that there are no other terminal railroads in the region that are in need of a rail yard and the services that the GU can provide at the Yard. If the GU does not resolve this dispute as soon as possible, and move the BRT into its Yard, then it will lose the BRT as a tenant and lose the income which results from having the BRT at the Yard. During the late summer and into the fall the BRT advised the GU that, unless the GU could resolve its dispute with the Town, it would need to find another location to relocate its operations. It is the GU's understanding and belief that the BRT has been actively looking for another suitable location for its operations due to the GU's inability to resolve its dispute with the Town.

65. The BRT agreement, and the income it is expected to generate, is integral to the GU's economic survival and its ability to finance further development.

SIGNED UNDER THE PENALTIES AND PAINS OF PERJURY THIS 26TH DAY OF DECEMBER, 2003.

Bridget Lucey
General Manager
Grafton and Upton Railroad Company

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EXHIBIT "B"

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September 8, 2003

Gerald M. Moody, Esq.
Town Counsel
Legal Department
52 Main Street
Milford, MA 01757-2622

RE: GRAFTON & UPTON RAILROAD COMPANY

Dear Attorney Moody:

Please be advised that my firm represents the Grafton & Upton Railroad Company ("GU").

The GU's representatives have approached the town concerning its desire to better utilize its Milford yard that is located near Depot Street and consists of 5.65 acres of land and about 2,000 feet of track. The GU is in negotiations to relocate the operations of the Boston Railway Terminal Company ("BRT") from South Boston to the Milford yard which will require improvements to the property such as, but not limited to, ingress and egress for truck traffic to Depot Street, construction of a building on the property, improvements of the tracks, and the clearing of some of the land. The BRT will conduct its operations at the Milford yard using its own locomotives and accepting industry cars containing shipments of steel from the GU's interchange with CSX, unloading of the steel, and then shipping the steel to customers. The purpose of this letter is to outline the GU's positions concerning a number of issues which have arisen as a result of discussions between the GU's representatives and the town.

It is the position of the GU that the town is preempted from asserting and/or invoking its zoning by-laws against the GU thereby refusing to issue the necessary permits to the GU for improvements of its Milford yard for railroad operations; the GU's use of its property is grandfathered as a non-conforming prior use; and, the GU could ultimately petition the Department of Telecommunications and Energy for an exemption to the Zoning By-Laws of the Town of Milford ("By-Laws"), pursuant to G.L. c. 40A, § 3, asserting that the proposed improvements are "reasonably necessary for the convenience or welfare of the public."

I. FACTUAL BACKGROUND

A. Grafton & Upton Railroad

On October 22, 1873, the Grafton Center Railroad was incorporated under the General Laws of the Commonwealth of Massachusetts. Survey and construction of the line was commenced shortly thereafter and by April 1874 narrow gauge rails were laid in place. The railroad commenced operations on August 24, 1874, mostly as a passenger line.

On or about March 26, 1887, the railroad was re-built to standard gauge and its name was changed to the Grafton & Upton Railroad Company ("GU"). Thereafter, and within the next decade, the tracks were extended to Upton, Hopedale and Milford. The railroad has been operating its 15 mile line from Milford to North Grafton since the mid-1890's and has evolved from a passenger to a freight railroad.

The GU interchanges with the CSX railroad at the CSX's Milford Secondary Branch in Milford. The terminal in West Upton has a trestle for hopper car unloading and buildings for trans-loading of boxcars. The terminal in North Grafton can accommodate boxcars and flatcars for trans-loading. The GU has never ceased operations. It has never sought or received a certificate of public convenience and necessity from the federal government for the abandonment of its track rights.

B. Boston Railway Terminal Company

The BRT currently operates from South Boston on the tacks of and under an agreement with CSX. It now desires to re-locate its operations to the GU's Milford yard. The BRT is a fully functioning railroad owning and operating its own locomotives. In order for the BRT to move its operations to the GU's Milford yard improvements to the property will be required such as, but not limited to, ingress and egress for truck traffic to Depot Street, construction of a building on the property, improvements of the tracks, and the clearing of some of the land. BRT will conduct its operations at the Milford yard, under an agreement with the GU, operating its own locomotives and accepting industry cars with shipments of steel at the GU's interchange with CSX.

C. Milford Zoning By-Laws

The Town of Milford ("Milford") first enacted its By-Laws on September 11, 1945, which became effective May 3, 1946. As a result of the zoning scheme employed by Milford, the GU's Milford yard is located in a district as has been classified as General Residential (RA). The GU's use of its property is a non-conforming prior use (presently not allowed as classified in RA) due to the fact that the railroad operations were ongoing for at least fifty (50) years before the By-Laws were first enacted.

II. DETAILS AND SPECIFICS OF THE GU'S POSITIONS

A. MILFORD IS PREEMPTED FROM ASSERTING AND/OR INVOKING ITS ZONING BY-LAWS AGAINST THE GU TO PROHIBIT THE GU FROM USING ITS MILFORD YARD AND TRACKS IN RAILROAD OPERATIONS

The GU and the railroad industry are and have been regulated by the federal government since the late 19th and early 20th centuries when the railroads exercised a virtual monopoly over transportation. H. Rep. No. 104-311, 90 (1995), U.S. Code Cong. & Admin. News 1996, p. 793. To protect against the power of the railroads, Congress asserted federal authority over the railroads, passing the Interstate Commerce Act, c. 104, 24 Stat. 379 (1887), which, as amended, still governs federal regulation of railroads. It has been recognized as "among the most pervasive and comprehensive of federal regulatory schemes." Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981). Congressional exemption of rail carriers from state and municipal regulation was "clear, broad and unqualified." Norfolk & Western Ry. Co. v. American Train Dispatchers Ass'n, 499 U.S. 117, 127-134 (1991).

In 1995, Congress eliminated what little remained of state and local regulatory authority over railroad operations through enactment of the Interstate Commerce Commission Termination Act ("the Act"), which has been codified at 49 U.S.C. § 701, *et seq*. The courts have held that "it is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations." CSX Transp., Inc. v. Georgia Public Service Comm'n, 944 F. Supp. 1573, 1581 (N.D.Ga. 1996).

1. The law of preemption

Preemption of state and local law by federal law is required by the Supremacy Clause of the U.S. Constitution, which provides that "the Laws of the United States...shall be the Supreme Law of the Land." U.S. Const. Art. XI, cl. 2. Any state or local law that conflicts with federal law is "without effect" and must give way. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 515 (1992); *see also* Teper v. Miller, 82 F.3d 989, 993 (11th Cir. 1996). The principles of federalism dictate that preemption should not be found unless preemption is "the clear and manifest purpose of Congress." Teper, 82 F.3d at 993. To be "clear and manifest," however, does not necessarily require Congress's intent to be "express;" congressional intent can be implied from the structure and purpose of a statute. Id.

Preemption exists in three forms: (1) "express," where Congress defines explicitly the extent to which its enactments preempt state law; (2) "field," in which Congress's regulation of a field is so pervasive or the federal interest is so dominant that an intent for federal law to occupy the field exclusively can be inferred; and (3) "conflict" preemption, where federal and state law

so conflict that is impossible for a party simultaneously to comply with both, or where state law prevents the accomplishment of the full purposes and objectives of federal law. *See* Teper, 82 F.3d at 993. Determining the preemptive effect of the Act on the town's zoning and licensing requirements requires juxtaposing these provisions, demarcating their respective scopes, and evaluating the extent to which they are in tension. Id. The Act expressly provides for exemption of state law as the Surface Transportation Board has jurisdiction over transportation by rail carrier when the transportation is under common control, management, or arrangement for a continuous carriage or shipment. 49 U.S.C. § 10501(a)(1). Further, the Board's jurisdiction includes transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules, interchange, practices, routes, services, and facilities of such carriers; and the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. 49 U.S.C. § 10501(b). The remedies provided with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law. Id.

The expansive reach of this preemption clause covers matters "with respect to regulation of rail transportation" and the stated purposes of the Act are also suggestive of field preemption. Although one need not go beyond the language of § 10501 to determine whether Congress intended the Act to preempt at least some state law, one must nevertheless "identify the domain expressly pre-empted" by that language. Medtronic, Inc. v. Lohr, 518 U.S. 470, 484 (1996). Although this analysis begins with the Act's text, the interpretation of the text "does not occur in a contextual vacuum." Id, at 485. The interpretation is informed by two presumptions: first; there is a presumption, especially in fields where the states have traditionally reigned, that "the historic police powers of the State were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Id. This approach comports with notions of federalism and the historic place held by the states in the regulation of health and safety. Id. However, this principle gives way where what is at issue is regulation of an area where there has been a history of significant federal presence as is the case herein with the regulation of the railroad industry. United States v. Locke, 529 U.S. 89 (2000).

Second, the analysis of a statute's preemptive scope is guided by the principle that "the purpose of Congress is the ultimate touchstone" in every preemption case. Medtronic, 518 U.S. at 485. Congress's intent is discerned primarily from the statute's language and its "statutory framework." Id, at 486. Also relevant are the "structure and purpose of the statute as a whole," Id, *see also* Felder v. Casey, 487 U.S. 131, 138 (1988). The intent or purpose of the law said to be preempted, however, is immaterial; its effect governs. Teper, 82 F.3d at 995. Under the Supremacy Clause, if the state or local law "in effect substantially impedes or frustrates federal regulation, or trespasses on a field occupied by federal law," it "must yield, no matter how admirable or unrelated the purpose of that law." Id.

The GU's use of its property is protected from the application of the local zoning regulations which are preempted by the federal regulations. The Board has the sole authority to regulate the GU's use of the Milford yard or the yard's operation under an agreement with the BRT. The GU plans to allow BRT to use and operate its Milford yard under an agreement which will involve the use of the switch, at the CSX's Milford Secondary Branch, tracks, the yard and ground for transportation of property by rail. *See*: 49 U.S.C. § 10102(6) and 49 U.S.C. § 10501. There already exist in the yard at least four sets of tracks, two of which follow the perimeter of the yard that re-connect by Depot Street and the other two sets of tracks terminate in the yard.

If Milford were permitted to prohibit or regulate the use of the GU's Milford yard, then the application of the By-Laws would substantially impede or frustrate federal regulations and trespass on a field occupied by federal law. The authority and affect of the By-Laws must yield to the federal regulations due to the fact that the effect of the By-Law would be to prohibit the GU from conducting railroad operations or entering into agreements with other railroads to conduct railroad operations at its Milford yard. *See*: Felder, 487 U.S. at 138. With all due respect to Milford, the By-Laws are preempted by the federal regulations and the GU must be permitted to conduct railroad operations on its property in accordance therewith.

B. THE GU'S USE OF ITS PROPERTY IS GRANDFATHERED AS A NON-CONFORMING PRIOR USE

Even if the By-Laws are not preempted by the federal regulations, the GU is still entitled to use the Milford yard for railroad operations. The By-Laws do not apply to the GU's use of the Milford yard for railroad operations due to the fact that said use was existing at the time of the enactment of the By-Laws in 1946. § 3.1. of the By-Laws; and G.L. c. 40A, § 6.

The Supreme Judicial Court has decided a number of cases which questioned whether a use being made of premises which was not expressly authorized under the applicable zoning ordinance or by-law was nevertheless protected as a lawful nonconforming use. Cochran v. Roemer, 287 Mass. 500, 507-508 (1934)(use "is not different in kind . . . simply because it is bigger.") Building Commr. of Medford v. McGrath, 312 Mass. 461, 462 (1942)("a nonconforming use of the same premises may be not only continued but also increased in volume.") Medford v. Marinucci Bros. & Co. Inc., 344 Mass. 50, 60 (1962)("The distinction is between an increase in the amount of business, even a great increase, which does not work a change in use, and an enlargement of a nonconforming business so as to be different in kind in its effect on the neighborhood.").

The Supreme Judicial Court, in Bridgewater v. Chuckran, 351 Mass. 20, 23 (1966) set forth that three tests should be utilized for determining whether current use of property fits within the exemption granted to nonconforming uses: (1) whether the use reflects the nature and purpose of the use prevailing when the zoning by-law took effect; (2) whether there is a difference in the quality or character, as well as the degree, of use (3) whether the current use is

different in kind in its effect on the neighborhood. The intended use of the Milford yard by the GU is for railroad operations which was and has been its use since the By-Law took effect. The use of the property will be of the same quality and character and be an increase in use, but will not be a use that exceeds the area of the outer two tracks which surround the yard as presently laid out. *See* Medford v. Marinucci Bros. & Co. Inc., 344 Mass. at 51-53(the disputed use consisted of the laying of a new fifty-car side track parallel to a railroad's existing and allegedly nonconforming tracks, and the use of the siding for the unloading of large quantities of fill transported from New Hampshire for use in highway construction in this Commonwealth); McAleer v. Board of Appeals of Barnstable, 361 Mass. 317, 322-324 (1972).

C. THE GU COULD PETITION, PURSUANT TO G.L. C. 40A, § 3, THE DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY FOR AN EXEMPTION

Should the foregoing arguments fail the GU, then it will be forced to petition the Department of Telecommunications and Energy as a "public service corporation" pursuant to G.L. c. 40A, § 3 and c. 3, § 5, for an exemption from the By-Laws in order to build the necessary structures required to conduct its operations. The GU believes that it will most likely be able to establish that the proposed improvements are "reasonably necessary for the convenience or welfare of the public." G.L. c. 40A, § 3. This procedure is rather lengthy and would cause the GU a significant delay in being able to utilize the property for a use that is ongoing.

III. CONCLUSIONS

Milford is preempted by the application of the applicable federal regulations from asserting its By-Laws and preventing the GU from conducting its railroad operations (and improvements) at its Milford yard. The GU is proposing to continue to use its property for railroad operations which was and has been the property's use from the time of the enactment of the By-Laws, therefore said use is grandfathered as a prior non-conforming use. Last, the GU has the ability to petition the Commonwealth for an exemption from the requirements of the By-Law, but does not believe that such petition is necessary given the preemptive effect of the federal regulations and the prior non-conforming use of the property.

Once you have had an opportunity to review the foregoing, would you kindly contact me to discuss Milford's position. We look forward to working with the town in an effort to resolve these issues and to improving the Milford yard.

Sincerely,

Richard A. Davidson, Jr.

pc: Bridget Lucey
Bonnie Cohen

EXHIBIT "C"

RICH DAVIDSON
2 PAGES
Bob Krafty

October 10, 2003

Richard A. Davidson, Jr., Esq.
Flynn & Associates, P.C.
189 State Street, 6th Floor
Boston, MA 02019

RE: Boston Railway Terminal Company and Grafton & Upton Railroad

Dear Attorney Davidson:

This is in response to your letter of September 8, 2003. I also spoke with Robert Krafty who sent me additional information in relation to the proposed use of the Grafton & Upton (GU) property by the Boston Railway Terminal Company (BRT).

I have reviewed facts as I know them, your memorandum and have done my own research in relation to applicable law. In sum, based upon available information, I cannot conclude as you do that the proposed activity at the Milford GU property is exempt from application of local zoning by-laws under the Interstate Commerce Commission Termination Act (ICCTA). Additionally, I must respectfully disagree with your conclusion that the proposed operations of BRT are "grandfathered" under M.G.L. c. 40A, Section 6 and applicable provisions of the Milford Zoning By-Law.

I will address the zoning issue first. The subject property has been zoned residentially since the inception of zoning in Milford. The locus has not been utilized for any railroad, or other commercial activity, for well in excess of twenty years. To my knowledge, the locus has never been used as a terminal/trucking operation at any time in the past. I realize that from the perspective of applicable federal law the GU tracks have not been "abandoned". However, from a zoning perspective, the fact that the tracks may be re-activated and utilized for railroad purposes does not result in the protection of M.G.L. c. 40A, Section 6 for ancillary commercial activity which had never taken place on the site in any event.

I am fully cognizant of the breadth of the ICCTA and of the preemption provisions of 49 USC Section 10501(b). I have reviewed decisions of the Federal Courts and of the

Surface Transportation Board (STB). Although federal preemption is broad, the law has not been held to absolutely exempt railroad property or railroad owned real estate from application of local zoning regulations. In a First Circuit decision Boston and Main Corporation vs. Ayer, 330 F3rd 12, the Court cited an STB Decision referring to it as "finely crafted". The Court favorably referred to the STB position that state and local regulation is permissible "where it does not interfere with interstate rail operations,..." Id. at 16. The Court went on to further cite the STB position as follows:

> All local regulation, in the STB's view, is subject to the same test; whether the statue or regulation is being applied to "unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce." This, said the STB, was a fact bound question.
>
> Id.

From the facts as I understand them the GU/BRT proposal is comparable to the uses at issue in the case of Florida East Coast Railway Company vs. City of West Palm Beach, 110 F. Supp. 2nd 1367, aff'd. 266 F. 3rd 1324 (2001). In this case a company known as Rinker Materials Corporation was proposing to lease facilities of the Florida East Coast Railway (FEC) and establish a facility to receive aggregate materials by rail, and then to distribute from that point by truck. Citing the STB's Riverdale decision (See STB Fin. docket number 33466) the District Court held that "....activities and facilities not integrally related to the provisions of interstate rail are not subject to (STB) jurisdiction or to federal preemption." 110 F. Supp. 2nd at 1378. In upholding the lower court decision the Eleventh Circuit Court of Appeals held that "....Rinker's use of the property at the 15th Street Yard and the activities there performed by Rinker serve no public function and provide no valuable service to FEC; rather, the arrangement between FEC and Rinker merely facilitates Rinker's operation of a private distribution facility on FEC – owned premises." 266 F. 3rd at 1336.

Again, in summary, I cannot, based on the information available to me and my understanding of the applicable law, agree with your position that the ICCTA preempts Town of Milford enforcement of its zoning by-law in relation to the proposed BRT facility.

If you have any questions in relation to the above please feel free to call me.

Very truly yours,

Gerald M. Moody

GMM/jlg

cc: Board of Selectmen
Town Administrator

EXHIBIT "D"

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November 12, 2003

VIA FACSIMILE & OVERNIGHT MAIL
Gerald M. Moody, Esq.
Town Counsel Legal Department
Town of Milford
52 Main Street
Milford, MA 01757-2622

RE: Grafton and Upton Railroad Company – Milford Yard
Proposed Lease to Boston Railway Terminal Company

Dear Attorney Moody:

As you know, my firm represents the Grafton and Upton Railroad Company ("GU"), which is preparing to lease its property known as the Milford Yard to the Boston Railway Terminal Company ("BRT"). The Town has taken the position that GU/BRT's proposed use of the Milford Yard would be in violation of its zoning by-laws.

On September 8, 2003, we sent you a detailed letter in which we generally explained the relevant law on the issue of federal preemption. The Interstate Commerce Commission Termination Act ("ICCTA") vests exclusive jurisdiction in the Surface Transportation Board ("STB") over the type of operations the GU and BRT are planning to conduct at the Milford Yard, as well as the construction activities which will be necessary to carry out these operations. Consequently, the Town's zoning by-laws, to the extent they prohibit the GU/BRT's planned operations, are preempted.

You responded to us via correspondence dated October 10, 2003, in which, relying on the case of Florida East Coast Railway Co. v. The City of West Palm Beach, 266 F.3d 1324 (2001), you communicated the Town's position that the zoning by-laws do apply to the activities proposed by the GU and BRT. For the reasons discussed, *infra*, this case is not applicable to our factual scenario.

The purpose of this letter is to further supplement our earlier discussion of the relevant substantive law, explain why the Florida East Coast case is distinguishable from ours and present you with a further amplification of the GU's position in advance of our meeting, which has been scheduled to take place on Friday, November 14, 2003, at 11:00 a.m. Please note that the GU continues to be willing to work with the Town in this matter, but is prepared to exercise its considerable rights under federal law.

I. FACTUAL BACKGROUND:

Our September 8, 2003 letter to you contained a great deal of information about the history of the GU and its operations in Milford. The September 8, 2003 letter also contains detailed information about BRT and the operations and activities the GU and BRT plan to conduct at the Milford Yard. The factual background portion of the September 8, 2003 letter, a copy of which is enclosed herewith, is incorporated herein by this reference. The GU and BRT plan to bring freight (specifically, shipments of steel) into the Milford Yard, via an interchange with CSX Transportation, Inc., a larger freight railroad. These shipments of steel will originate in other states. The operations that the GU and BRT plan to conduct in the Milford Yard have an impact on interstate commerce and clearly pertain to "railroad transportation" as that term is defined in the ICCTA. *See infra*, at p. 3-4. In addition, the improvements the GU and BRT plan to make to the property (including the construction of a building, track improvements and the clearing of some of the land) will be necessary to carry out these operations.

II. DISCUSSION OF LAW:

A. A Brief History of Applicable Federal Law:

In 1887, Congress passed the Interstate Commerce Act ("ICA"), which established a statutory scheme for regulating the nation's railroads. The ICA was originally codified at 49 USC §1, *et seq.* The ICA established the Interstate Commerce Commission ("ICC") as the federal regulatory agency responsible for overseeing railroad transportation. Although the ICA has been changed and amended numerous times since its inception, it continues (in its present form) to govern interstate commerce.

In 1995, Congress abolished the ICC by enacting the ICCTA. Pub. L. No. 104-88, Dec. 29, 1995, 109 Stat. 803. The ICCTA established the STB to take the place of the ICC and granted the Board jurisdiction over certain rail functions and proceedings. *See* 49 USC §701(a). The ICCTA was passed in an effort to substantially reduce the regulation of railroads and other modes of surface transportation . *See* 49 U.S.C. §10101; *see also* H.R. Rep. No. 104-311, at 82 (1995); Sen. Rep. No. 104-176, at 2 (1995); Pejepscot Industrial Park Ind. Pk. v. Maine Central RR. Co., 215 F.3d 195 (1st CLR. 2003).

B. The Town's Zoning By-laws are Preempted by the ICCTA and the Federal Law Construing It:

The Supremacy Clause of the United States Constitution provides that the laws of the United States "shall be the supreme Law of the Land...any Thing in the constitution of Laws of any state to the contrary notwithstanding." Art. VI, cl. 2. "Where a state statute conflicts with or frustrates federal law, the former must give way." CSX Transportation v. Easterwood, 507 U.S. 658, 663 (1993), *citing* U.S. Const., Art. VI, cl. 2; *see also* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992); Maryland v. Louisiana, 457 U.S. 7254, 746, (1981). State and local laws can be preempted in three ways: (1) where they directly conflict with a federal law (conflict preemption); (2) where they are preempted by an expressed provision in the federal law (expressed preemption); or (3) where Congress intended that the federal law occupy the field of the subject matter covered by the local law (field or implied preemption). Although all three types of preemption may apply to the situation at the Milford Yard, our discussion here focuses only on "expressed preemption."

1. Express Preemption under the ICCTA:

When the statute being construed contains an expressed preemption clause, such as §10501(b), "the task in statutory construction must in the first instance focus on the plain wording of the clause...," Easterwood, 507 U.S. at 664. The ICCTA contains a clearly expressed preemption clause which grants to the STB exclusive jurisdiction over all railroad transportation; specifically, subsection 10501(b) states:

> (b) the jurisdiction of the Board over –
> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules..., practices, routes, services and facilities of such carriers; and
> (2) the construction, acquisition, operation, abandonment or discontinuance of spur, industrial, team, switching, or sidetracks, or facilities, even if the tracks are located, or intended to be located entirely in one state, is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. §10501(b). As one court has observed, "it is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations." CSX Transportation, Inc. v. Georgia Pub. Serve. Comm'n., 944 F. Supp. 1573, 1581 (N.D. Ga. 1996).

Congress and the courts have long recognized a need to regulate railroad operations at the federal level. Congress' authority under the Commerce Clause to regulate the railroads is well-established, *see, e.g.*, Houston, E. & W. Tex. Ry. V. United States, 234 U.S. 342, 350-52 (1914); Pittsburgh v. Lake Erie R.R. v. Railway Labor Executives' Ass'n, 491 U.S. 490, 510 (1989), and

the Supreme Court repeatedly has recognized the preclusive effect of federal legislation in this area. *See, e.g.*, Colorado v. United States, 271 U.S. 153, 165-66 (1926) (ICC abandonment authority is plenary and exclusive); Transit Comm'n v. United States, 289 U.S. 121, 127-128 (1933) (ICC authority over interstates rail construction is exclusive); City of Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77, 88-89 (1958) (local authorities have no power to regulate interstate rail passengers).

The broad nature of Congress' preemption under the ICTA is further evidenced by the expansive definitions for the terms "railroad" and "transportation." The Act defines "railroad" as including, in pertinent part:

> (B) the road used by a rail carrier and owned by it or operated under an agreement; and
> (C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard and ground, used or necessary for transportation.

49 U.S.C. §10102(6). Here, it is important to note that the tracks which will be used as part of the BRT's operations, clearly meet this definition of "railroad". The definition of "transportation" includes:

> (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and
> (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling and interchange of passengers and property.

49 U.S.C. §10102(9). "It is clear...that Congress intended the preemptive net of the (ICCTA) to be broad by extending exclusive jurisdiction to the STB over anything included within the general and all inclusive term 'transportation by rail carriers.'" Georgia Pub. Serv. Comm'n, 944 F. Supp. at 1582. "By preempting state regulation of railroad operations, and granting exclusive jurisdiction over almost all aspects of railroad operations to the STB, Congress removes the ability of states to frustrate its policy of deregulating and reviving the railroad industry." Id. at 1583. Thus, when §10501(b) grants the STB exclusive jurisdiction over "transportation by rail carriers" it logically includes the yard, property, tracks, buildings, facilities, freight yards and any equipment used in connection with the railroad or related to the movement of property (i.e. freight), including the Milford Yard and the steel which will be delivered by rail to the BRT at the yard. Consequently the ICCTA, by its clearly expressed terms, preempts any zoning by-laws with the respect to the railroad operations which the GU and BRT plan to conduct at the Milford Yard.

The anticipated operations at the Milford Yard fall under this definition of transportation. It should be noted, in this regard, that the BRT is a railroad company and that it will be moving the steel in and around the yard with its own locomotives, that it will be making shipments on

rail cars, that it will be handling and interchanging these shipments at the Milford Yard and that the buildings and facilities it plans to construct will be used for the movement of these shipments.

2. Cases Involving ICCTA Preemption of Local Zoning By-laws:

A number of recent decisions have determined that §10501(b) preempts local zoning by-laws (and other similar ordinances) and that the STB's authority to regulate railroad operations is exclusive. In City of Auburn v. United States, several cities in the state of Washington sought judicial review of several STB decisions which found that state and local environmental review laws were preempted by the ICCTA. 154 F. 3d 1025, 1027-28 (1999). In City of Auburn, the Burlington Northern Santa Fe Corporation ("BNSF") sought approval from the STB to reopen for passenger service a rail line (known as the Stampede Pass route) which it had recently reacquired. Id. In order to restore the Stampede Pass route, the BNSF was required to repair and improve the line, including the replacement of track sidings and buildings, tunnel improvements and the construction of communication towers, and sought STB approval to do so (after taking the position during local proceedings that local by-laws were preempted by the ICCTA). Id. The cities then petitioned the STB for an opinion on the ICCTA's preemptive effect. Id. The STB issued a formal opinion that the local by-laws were preempted and the Ninth Circuit Court of Appeals upheld the STB determination.

The Ninth Circuit found that the congressional intent to preempt this kind of local regulation of rail lines was explicit in the plain language of the ICCTA and the statutory framework surrounding it: "we find that the plain language of two sections of the ICCTA (§§10501 and 11323-25) explicitly grant the STB authority over railway projects like Stampede Pass." Id. at 1030. The court noted that "all the cases cited by the parties find a broad reading of Congress' preemption intent, not a narrow one..." and that "[p]re-ICCTA case law addressing federal preemption over railroad operations also supports a broad reading of the statute." Id. (citations omitted). Finally, the Ninth Circuit rejected the cities' argument that the ICCTA applies only to "economic" regulation of railroads: "if local authorities have the ability to impose 'environmental' permitting regulations on the railroad, such power will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line." Id. at 1031.

In the case of Friberg , et al. v. Kansas City Southern Ry. Co., the Fifth Circuit Court of Appeals reversed a jury verdict in favor of the plaintiffs, property owners who claimed that the defendant railroad caused them to go out of business by continuously blocking a grade crossing on a road which led to their business, in violation of Texas' Anti-Blocking Statute. 267 F.3d 439 (2001). The track in question was a sidetrack which the Kansas City Southern ("KCS") had begun using with more frequency after it was significantly lengthened to accommodate longer trains. In determining that the ICCTA preempted any local ordinances affecting rail operations, the Fifth Circuit stated that "[t]he language of the statute could not be more precise, and it is beyond peradventure that regulation of KCS train operations, as well as the construction and

operation of the KCS side tracks, is under the exclusive jurisdiction of the STB...." Id. at 443. Echoing the sentiment expressed by the Ninth Circuit in City of Auburn, the Friberg court further noted that "[t]he regulation of railroad operations has long been a traditionally federal endeavor, to better establish uniformity in such operations and expediency in commerce, and it appears manifest that Congress intended the ICCTA to further that exclusively federal effort...." Id.

A trial judge in the United States District Court for the District of Minnesota, in the case of Soo Line Railroad Co. v. City of Minneapolis, granted summary judgment in favor of the railroad, where it had sued the City for declaratory judgment and injunctive relief arising from the City's refusal to grant it demolition permits. 38 F. Supp. 1096 (D. Minn. 1998). The railroad had, pursuant to the City's "Code of Ordinances," applied for (and were denied) permits to demolish several buildings in a rail yard which was located in the City. The demolition was a necessary part of the railroad's redevelopment of the yard. One of the City's departments had denied the permit application on the grounds that the buildings which had been scheduled for demolition may have had historic value. Id. at 1097-1098. In granting the railroad's motion, the court determined that the ICCTA preempted the City's authority to regulate the railroad's proposed activities, finding that:

> [t]he language of the Act expresses Congress' clear intent to preempt state and local regulatory authority over the construction, development, and operation of railroad facilities.... (The) demolition of the five buildings and subsequent construction, development, and operation of the proposed bulk transfer facility is subject only to such regulations and requirements as may be imposed by the STB pursuant to the ICCTA.

Id. at 1101.

In Village of Ridgefield Park v. N.Y. Susq. & Western Ry. Corp., the plaintiff Village sought to enjoin a nuisance and to regulate the defendant railroad's facility pursuant to, *inter alia*, the Village's zoning by-laws. 163 N.J. 446 (2000). The railroad had begun construction of a maintenance facility without first applying for zoning or construction permits. Id. at 450. The Village ultimately sued the railroad, seeking to require it to apply for permits and to shut down the facility. A trial judge granted the railroad's motion for summary judgment and dismissed the Village's lawsuit. The judge's ruling was upheld by New Jersey's Appellate Division and was ultimately affirmed by the New Jersey Supreme Court. In finding that the ICCTA preempted the Village's attempts to regulate the railroad, the New Jersey Supreme Court reasoned that:

> [b]ecause zoning regulations imposed by the Village "clearly could be used to defeat [the Railroad's] maintenance and upgrading activities, thus interfering with the efficiency of railroad operations that are part of interstate commerce,"...the Village may not dictate the location on its right-of-way of the Railroad's maintenance facility.

Id. at 462.

Finally, in Norfolk Southern Ry. Co. v. City of Austell, the federal court in the Northern District of Georgia granted summary judgment on behalf of the plaintiff railroad where it had brought an action for declaratory relief regarding the application, to the construction of an intermodal facility, of the City's zoning by-laws. 1997 U.S. Dist. LEXIS 17236 (Aug. 18, 1997). In so doing, the court determined that the ICCTA preempted the City's by-laws and land use permitting requirements because they prevented the construction and operation of the railroad's facility. Id. "Based upon the clear and unambiguous language of the ICCTA, the court concludes that the instant intermodal facility comes within the ICCTA's definition of 'transportation by rail carriers' over which the STB is given exclusive jurisdiction under... §10501(b)(1)." Id.

3. The STB's Own Interpretation of Its Authority and ICCTA Preemption:

The STB's rulings on the preemptive effect of the ICCTA are also an important consideration (although not dispositive), since "[a]s the agency with authority delegated from Congress to implement the provisions of the [ICCTA], the STB is 'uniquely qualified to determine whether state law...should be preempted.'" Georgia Pub. Serv. Comm'n, 944 F. Supp. at 1584. In this regard, the STB has, since its inception, taken the position that it has exclusive authority over the type of railroad operations that the GU and BRT plan to conduct at the Milford Yard. For instance, shortly after it was created, the STB issued a public notice which stated "that the authority of certain states to regulate intrastate rail matters was terminated by the (ICCTA), effective January 1, 1996." *STB Public Notice*, Ex Parte No. 388, April 3, 1996.

In the underlying decision which was ultimately appealed to the Ninth Circuit in City of Auburn, the STB stated that:

> [A] state or local permitting process for prior approval of this project, or of any aspect of it related to interstate transportation by rail,...is preempted....The Board now has exclusive authority over the construction and operation of rail lines that are part of the interstate rail network....Local law is preempted when the challenged state statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Cities of Auburn and Kent, WA, Petition for Declaratory Order, STB Finance Docket No. 33200, 1997 WL 362017 at *4-6 (I.C.C.) (July 1, 1997).

Two years later, the STB reiterated its position that the ICCTA preempts local zoning by laws:

> [I]t is well-settled that...the Borough can not apply its local zoning ordinances to property used for NYSW's railroad operations....Zoning regulations that the Borough would impose clearly could be used to defeat (the railroad's) maintenance and upgrading activities, thus interfering with the efficiency of railroad operations that are part of

> interstate commerce...This is the type of interference that Congress sought to avoid in enacting §10501(b).

Borough of Riverdale Petition for Declaratory Order, The New York Susquehanna and Western Railway Corporation, 1999 WL 715272 at * 7 (S.T.B. Sept. 9, 1999). The STB further determined that "local entities...can not require that railroads seek building permits prior to constructing or using railroad facilities because of the inherent delay and interference with interstate commerce that such requirements would cause." Id. at *8.

4. ICCTA Preemption of the Town's By-laws:

The case law, as well as the STB's own decisions, holds that the Town's zoning by-laws are preempted, at least to the extent they interfere with the GU/BRT's ability to conduct "railroad transportation" at the Milford Yard. The Town cannot prevent the GU and BRT from moving shipments of steel into and through the Yard, and it also cannot prohibit the construction activities necessary to improve the Yard in order to accommodate these services. The Town likewise cannot require the GU or BRT to submit to any permitting process in this regard.

The GU does not dispute that the Town's by laws, to the extent they pertain to matters of "public health and safety," may not be specifically preempted. Nevertheless, the Town cannot use any such by laws or ordinances as an obstacle to the GU/BRT's attempts to provide the contemplated "railroad transportation" services at the Milford Yard.

5. The Florida East Coast Case Does Not Apply:

The Florida East Coast case is not applicable to the GU/BRT's plans for the Milford Yard, because the factual scenario here is completely different and because the Eleventh Circuit very narrowly tailored its holding to apply only to the facts of that case. On this first point, in your October 10, 2003 letter you stated that the "GU/BRT proposal is comparable to the uses at issue in" Florida East Coast. This is not true. In Florida East Coast, the arrangement between the railroad and its tenant (Rinker) was essentially a land swap, and Rinker leased the railroad's premises in order to conduct its own distribution services. The services provided by Rinker had nothing to do with providing "railroad transportation" as that term is defined in the ICCTA. As you yourself have noted, the Eleventh Circuit held that "Rinker's use of the property...and the activities there performed by Rinker serve no public function and provide no valuable services to FEC; rather, the arrangement between FEC and Rinker merely facilitates Rinker's operation of a private distribution facility on FEC-owned premises." Florida East Coast, 266 F. 3d at 1336, as quoted in your letter.

In direct contrast, the activities that the GU and BRT plan to conduct at the Milford Yard at the same time serve the important public function of facilitating the interstate shipment of steel, are "integrally related" to the provision of interstate rail transportation and also provide valuable services to the GU – specifically, the provision of income, the restoration and

improvement of the use of a vital rail yard, the ability to conduct interchanges with the CSX and the reopening of a profitable rail line. On these points alone, the facts of our situation differ dramatically from the crucial facts upon which the Florida East Coast case was decided – circumstances without which the decision, by the court's own admission, would have been considerably different.

Indeed, the Eleventh Circuit took great pains to narrowly tailor its decision so that it has remarkably limited application. As discussed *supra* (and as you noted), the Eleventh Circuit's decision hinges upon its determination that the arrangement between Rinker and FEC served a "purely private function" – specifically, the "operation of a private distribution facility on FEC-owned premises." Id. at 1336. Based on this finding, the Eleventh Circuit held that "because West Palm Beach's application of its ordinances does not constitute 'regulation of rail transportation,' 49 U.S.C. §10501(b), the ICCTA does not preempt the City's actions." Id. at 1326 (emphasis supplied). The court further limited the scope of its holding by stating that "existing zoning ordinances of general applicability, which are enforced against a private entity leasing property from a railroad for non-rail transportation purposes, are not sufficiently linked to rules governing the operation of the railroad so as to constitute laws 'with respect to regulation of rail transportation.'" Id. at 1331 (emphasis supplied). The Eleventh Circuit also specifically noted that:

> [b]oth parties agree that the City does not impose its generally applicable zoning ordinances against FEC thereby preventing FEC from operating in the otherwise residential neighborhood....[w]e are not called upon to decide whether federal law would constrain the City's power...to limit FEC's operations should it engage in an aggregate distribution business in exactly the same manner as Rinker.

Id. at 1331-32 (emphasis supplied).

Thus, given the narrowly defined scope of the Florida East Coast holding, zoning ordinances which do affect "rail transportation" as that term is defined in the ICCTA (*see, supra* at p. 4) are preempted by the Act, even under the Eleventh Circuit's analysis. The Eleventh Circuit recognized this implication by taking note that its holding would have been different if the City's ordinance had been applied to the railroad ("certain actions...which might or might not be preempted if taken against FEC, do not violate the Supremacy Clause when applied against Rinker") or a third party which actually conducted railroad operations ("[c]ertain local regulations applied against a third-party may be so intertwined with the provision of rail transportation services to the public as to frustrate the objectives of federal railroad regulation."). Id. at 1336-37 and n. 9.

The linchpin of the Eleventh Circuit's decision is whether or not the local by-law affects "railroad transportation." In our case, it clearly does - the factors which were not present in Florida East Coast clearly prevail in our situation. BRT is, as is evident from its name ("Boston Railway Terminal Company"), a railroad company. It is quite different from Rinker. Whereas

Rinker was conducting an intrastate trucking distribution facility, BRT will be moving shipments of freight, in interstate commerce, into, around and out of the Milford Yard. Shipments will be accepted on railroad cars in interchange from CSX. BRT will be moving the freight about the yard with its own locomotives. The tracks and facilities in and around the Yard are integral to the movement of these cars. Clearly, the activities which will be performed by BRT at the Milford Yard meet the ICCTA's definition of "railroad transportation" and the Town is precluded from attempting to regulate these operations through the use of its by laws. This is an entirely different situation from the one encountered by the Eleventh Circuit in Florida East Coast and that decision has no relevance to our case.

III. CONCLUSION:

It is the GU's position, as expressed herein, that the Town cannot prevent it and the BRT from improving the Milford Yard and thereafter moving shipments of freight through theYard. This position is supported by the language of the ICCTA and its statutory framework, the clear weight of the applicable case law and the STB's own determination of the Act's preemptive effect. The GU would like the Town to reconsider its position on this issue, given that the GU and BRT plan to proceed with their railroad activities. We look forward to further discussing this situation with you at our meeting on the 14th. At that time, we will be seeking a date certain for the Town to respond to us in writing in this regard.

Thank you for your attention to this matter.

Sincerely,

Michael B. Flynn

MBF/peg
Enclosure
cc: Bonnie Cohen
Bridget Lucey
Robert C. Krafty
Richard A. Davidson, Jr.

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34444

NOTICE OF APPEARANCE
AND DECLARATION OF REPRESENTATION

Now come Michael B. Flynn, Esq., Richard A. Davidson, Jr. Esq. and the firm of FLYNN & ASSOCIATES, P.C., pursuant to 49 C.F.R. § 1103.4 and enter their appearance on behalf of the respondent Grafton & Upton Railroad Company in the matter of *The Petition Of The Town Of Milford, Massachusetts For Declaratory Order*, STB Finance Docket No., and further declare that they are authorized to represent the aforesaid Grafton and Upton Railroad Company in this matter.

Respectfully submitted,

Michael B. Flynn BBO No.: 559023
Richard A. Davidson, Jr. BBO No.: 552988
FLYNN & ASSOCIATES, P.C.
189 State Street
Sixth Floor
Boston, MA 02109
(617) 722-8253

DATED: December 26, 2008

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34444

CERTIFICATE OF SERVICE

I, Michael B. Flynn, Esq., counsel for the respondent Grafton & Upton Railroad Company, hereby certify that copies of ***The Grafton & Upton Railroad Company's Reply To The Petition Of The Town Of Milford, Massachusetts For Declaratory Order*** and ***Notice Of Appearance And Declaration Of Representation*** were served by private express mail carrier this 26th day of December 2003 upon the following parties:

(1) Gerald M. Moody
Town Counsel
Town of Milford
Town Hall – 52 Main Street
Milford, MA 01757

(2) Boston Railway Terminal Corporation
ATTN: Allen Marsh
11-21 Fargo Street
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